

2 2 5 4 2

Document #: 22542

Date Filed: 12/9/2004

Dept, Agency, Comm: Roads, Department of

Title: 407

Book: NAC

Chapter: 2

Section:

Subject Matter: Practice & Procedure for Contested Cases

Effective Date: 12/14/2004

Amendment Date: 7/16/1983

NEBRASKA ADMINSTRATIIVE CODE

Title 407 - NEBRASKA DEPARTMENT OF ROADS - GOVERNMENT AFFAIRS DIVISION

Chapter 2 - Practice and Procedure for Contested Cases

001 GENERAL

001.01 Scope. The following rules and procedures shall apply to any contested case hearings required by the rules of the Nebraska Department of Roads.

001.02 Definitions. The following definitions shall apply as used throughout Chapter 2 of these rules and regulations.

001.02A Contested case shall mean a proceeding before the department in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after a hearing by the department.

001.02B Department shall mean the Nebraska Department of Roads, including any of its districts, divisions or sections, or the director or other officer.

001.02C Ex parte communication shall mean an oral or written communication which is not on the record in a contested case with respect to which reasonable notice to all parties was not given. Ex parte communication shall not include:

001.02C1 Communications which do not pertain to the merits of a contested case;

001.02C2 Communications required for the disposition of ex parte matters as authorized by law;

001.02C3 Communications in a rulemaking proceeding; and

001.02C4 Communications to which all parties have given consent.

001.02D Hearing officer shall mean the person or persons conducting a hearing, contested case, or other proceeding pursuant to the Administrative Procedure Act, whether designated as the presiding officer, administrative law judge, or some other title designation.

001.02E Party means the person by or against whom a contested case is brought or a person allowed to intervene in a contested case.

001.02F Petition means the initial document filed by or with the department that sets forth a claim and request for department action.

APPROVED
JON BRUNING
ATTORNEY GENERAL

SEP 28 2004

BY Jeffrey T. Schroeder
ASSISTANT ATTORNEY GENERAL

APPROVED

DEC 9 2004

Mike Johanns
MIKE JOHANNS
GOVERNOR

DEC -9 2004

Title 407 - NEBRASKA DEPARTMENT OF ROADS - GOVERNMENT AFFAIRS DIVISION

Chapter 2 - Practice and Procedure for Contested Cases (Continued)

002 PROHIBITIONS AGAINST EX PARTE COMMUNICATIONS

002.01 Prohibitions, when applicable. The prohibitions found in this section shall apply beginning at the time notice for hearing is given. The department may designate an earlier time, but such earlier time shall be required to be set forth in the department's rules of procedure.

002.02 Prohibitions, to whom applicable.

002.02A Parties and public. No party in a contested case or other person outside the department having an interest in the contested case shall make or knowingly cause to be made an ex parte communication to the hearing officer or to the director or an employee who is or may reasonably be expected to be involved in the decision making process of the contested case.

002.02B Persons in decision-making roles. A hearing officer, the director or an employee who is or may reasonably be expected to be involved in the decision-making process of the contested case shall not make or knowingly cause to be made an ex parte communication to any party in a contested case or other person outside the department having an interest in the contested case.

002.02C Investigators. The director or an employee engaged in the investigation or enforcement of a contested case shall not make or knowingly cause to be made an ex parte communication to a hearing officer or the director or an employee who is or may reasonably be expected to be involved in the decision-making process of the contested case.

002.03 Disclosure of contacts. The hearing officer or the director or an employee who is or may reasonably be expected to be involved in the decision-making process of the contested case who receives or who makes or knowingly causes to be made an ex parte communication set forth in subsections 002.02A through 002.02C shall file in the record of the contested case:

002.03A All such written communications;

002.03B Memoranda stating the substance of all such oral communications; and

002.03C All written responses and memoranda stating the substance of all oral responses to all the ex parte communications.

002.03D The filing shall be made within two working days of the receipt or making of the ex parte communication. Notice of the filing, with an opportunity to respond, shall be given to all parties of record.

002.03E Filing and notice of filing provided under subsection 002.03D shall not be considered on the record and reasonable notice for purposes of the definition of ex parte communication.

REV -9, 2004

Title 407 - NEBRASKA DEPARTMENT OF ROADS - GOVERNMENT AFFAIRS DIVISION

Chapter 2 - Practice and Procedure for Contested Cases (Continued)

003 INTERVENTION IN A CONTESTED CASE

003.01 Intervention in a contested case shall be allowed when the following requirements are met:

003.01A A petition for intervention must be submitted in writing to the hearing officer or designee at least five days before the hearing. Copies must be mailed by the petitioner for intervention to all parties named in the hearing officer's notice of the hearing;

003.01B The petition must state facts demonstrating that the petitioner's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the petitioner qualifies as an intervener under any provision of law; and

003.01C The hearing officer or designee must determine that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

003.02 The hearing officer or designee may grant a petition for intervention at any time upon determining that the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings.

003.03 If a petitioner qualifies for intervention, the hearing officer or designee may impose conditions upon the intervener's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Those conditions may include:

003.03A Limiting the intervener's participation to designated issues in which the intervener has a particular interest demonstrated by the petition;

003.03B Limiting the intervener's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings; and

003.03C Requiring two or more interveners to combine their presentation of evidence and argument, cross-examination, discovery, and other participation in the proceedings.

003.04 The hearing officer or designee, at least 24 hours before the hearing, shall issue an order granting or denying each pending petition for intervention, specifying any conditions and briefly stating the reasons for the order.

003.04A The hearing officer or designee may modify the order at any time, stating the reasons for the modification.

003.04B The hearing officer or designee shall promptly give notice of an order granting, denying, or modifying intervention to the petitioner for intervention and to all parties.

Title 407 - NEBRASKA DEPARTMENT OF ROADS - GOVERNMENT AFFAIRS DIVISION

Chapter 2 - Practice and Procedure for Contested Cases (Continued)

004 COMMENCEMENT OF A CONTESTED CASE

004.01 The contested case begins with the filing of a petition and request for hearing, if applicable, with the department. The petition is the initial document filed by or with the department that sets forth a claim and request for department action.

004.02 The parties to a contested case shall be the petitioner or person by whom a contested case is brought and the respondent or person against whom a contested case is brought.

004.03 A party may appear on his or her own behalf in a contested case proceeding or may be represented by an attorney or other representative as permitted by law.

004.04 The pleadings in a contested case may include a petition, answer, reply, notice, motion, stipulation, objection or order or other formal written document filed in a proceeding before the department. Any pleading filed in a contested case shall meet the following requirements:

004.04A The pleading shall contain a heading specifying "Nebraska Department of Roads" and the title or nature of the pleading, shall state material factual allegations and state concisely the action the department is being requested to take, shall contain the name and address of the petitioner, and shall be signed by the party filing the pleading, or when represented by an attorney, the signature of that attorney.

004.04A1 Attorneys shall also include their address, telephone number and bar number.

004.04A2 The initial petition shall also contain the name and address of the respondent.

004.04B All pleadings shall be made on white, letter-sized (8½x11) paper and shall be legibly typewritten, photostatically reproduced, printed or handwritten. If handwritten, a pleading must be written in ink.

004.05 All pleadings shall be filed with the department at its official office, 1500 Highway 2, P.O. Box 94759, Lincoln, Nebraska 68509, Attention: Government Affairs Division. Filing may be accomplished by personal delivery or mail and will be received during regular office hours of the department.

004.06 The department shall serve a copy of the petition on each respondent listed in the petition personally or by first-class or certified mail. Written proof of such service shall be filed with the department. Each respondent who chooses to file a responsive pleading must do so within 20 days from the date of personal service or the date of department mailing of the petition.

004.07 All pleadings subsequent to the initial petition shall be served by the party filing such pleading upon all attorneys of record or other representatives of record and upon all unrepresented parties. Service shall be made personally or by first-class or certified mail. Written proof of such service shall be filed with the department.

DEC -9

Title 407 - NEBRASKA DEPARTMENT OF ROADS - GOVERNMENT AFFAIRS DIVISION

Chapter 2 - Practice and Procedure for Contested Cases (Continued)

004.08 Unless state law provides that a hearing is not required, a hearing date shall be set by the department in accordance with statutory requirements. A written notice of the time and place of hearing and the name of the hearing officer, if known, shall be served by the department upon all attorneys of record or other representatives of record and upon all unrepresented parties. The notice must include a proof of such service and will be filed with the department.

004.09 In computing time prescribed or allowed by any of the department's rules and regulations or by any applicable statute in which the method of computing time is not specifically provided, days will be computed by excluding the day of the act or event and including the last day of the period. If the last day of the period falls on a Saturday, Sunday, or state holiday, the period shall include the next working day.

005 HEARING OFFICER: CRITERIA

005.01 The director may delegate to a hearing officer other than the director the functions of conducting a prehearing conference and/or a hearing and submitting a recommended decision to the department.

005.02 A person who has served as investigator, prosecutor, or advocate in a contested case or in its prehearing stage may not serve as hearing officer or assist or advise a hearing officer in the same proceeding except as provided in subsection 005.04.

005.03 A person who is subject to the authority, direction, or discretion of one who has served as investigator, prosecutor, or advocate in a contested case or in its prehearing stage may not serve as hearing officer or advise a hearing officer in the same proceeding except as provided in subsection 005.04.

005.04 If all parties consent, a person who has served as, or who is subject to the authority, direction, or discretion of one who has served as investigator, prosecutor, or advocate in a contested case or in its prehearing stage may assist a hearing officer in the preparation of orders.

005.05 A person who has participated in a determination of probable cause or other equivalent preliminary determination in a contested case may serve as hearing officer or assist or advise a hearing officer in the same proceeding.

005.06 A person may serve as hearing officer at successive stages of the same contested case.

006 PREHEARING PROCEDURES

006.01 Prehearing conferences and orders. A hearing officer designated to conduct a hearing may determine, subject to the department's rules and regulations, whether a prehearing conference will be conducted. If a prehearing conference is not held, a hearing officer for the hearing may issue a prehearing order, based on the pleadings, to regulate the conduct of the proceedings.

Title 407 - NEBRASKA DEPARTMENT OF ROADS - GOVERNMENT AFFAIRS DIVISION

Chapter 2 - Practice and Procedure for Contested Cases (Continued)

006.01A If a prehearing conference is conducted:

006.01A1 The hearing officer shall promptly notify the department of the determination that a prehearing conference will be conducted. The department may assign another hearing officer for the prehearing conference; and

006.01A2 The hearing officer for the prehearing conference shall set the time and place of the conference and give reasonable written notice to all parties and to all persons who have filed written petitions to intervene in the matter. The department shall give notice to other persons entitled to notice.

006.01A3 The notice referred to in subsection 006.01A2 shall include the following:

006.01A3(a) The names and mailing addresses of all parties and other persons to whom notice is being given by the hearing officer;

006.01A3(b) The name, official title, mailing address, and telephone number of any counsel or employee who has been designated to appear for the department;

006.01A3(c) The official file or other reference number, the name of the proceeding, and a general description of the subject matter;

006.01A3(d) A statement of the time, place, and nature of the prehearing conference;

006.01A3(e) A statement of the legal authority and jurisdiction under which the prehearing conference and the hearing are to be held;

006.01A3(f) The name, official title, mailing address, and telephone number of the hearing officer for the prehearing conference;

006.01A3(g) A statement that a party who fails to attend or participate in a prehearing conference, hearing, or other stage of a contested case or who fails to make a good faith effort to comply with a prehearing order may be held in default under the Administrative Procedure Act; and

006.01A3(h) Any other matters that the hearing officer considers desirable to expedite the proceedings.

Title 407 - NEBRASKA DEPARTMENT OF ROADS - GOVERNMENT AFFAIRS DIVISION

Chapter 2 - Practice and Procedure for Contested Cases (Continued)

006.01B The hearing officer shall conduct a prehearing conference, as may be appropriate, to deal with such matter as exploration of settlement possibilities, preparation of stipulations, clarification of issues, rulings on identity and limitation of the number of witnesses, objections to proffers of evidence, determination of the extent to which direct evidence, rebuttal evidence, or cross-examination will be presented in written form and the extent to which telephone, television, or other electronic means will be used as a substitute for proceedings in person, order of presentation of evidence and cross-examination, rulings regarding issuance of subpoenas, discovery orders, and protective orders, and such other matters as will promote the orderly and prompt conduct of the hearing. The hearing officer shall issue a prehearing order incorporating the matters determined at the prehearing conference.

006.01C The hearing officer may conduct all or part of the prehearing conference by telephone, television, or other electronic means if each participant in the conference has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.

006.02 Discovery in contested cases.

006.02A The hearing officer or a designee, at the request of any party or upon the hearing officer's own motion, may issue subpoenas, discovery orders, and protective orders in accordance with the rules of civil procedure except as may otherwise be prescribed by law. Subpoenas and orders issued under this subsection may be enforced by the district court.

006.02B Any prehearing motion to compel discovery, motion to quash, motion for protective order or other discovery-related motion shall:

006.02B1 Quote the interrogatory, request, question, or subpoena at issue, or be accompanied by a copy of the interrogatory, request, subpoena or excerpt of a deposition;

006.02B2 State the reasons supporting the motion;

006.02B3 Be accompanied by a statement setting forth the steps or efforts made by the moving party or his or her counsel to resolve by agreement the issues raised and that agreement has not been achieved; and

006.02B4 Be filed with the department. The moving party must serve copies of all such motions to all parties to the contested case.

006.02C Other than as provided in subsection 006.02B4 above, discovery materials need not be filed with the department.

Title 407 - NEBRASKA DEPARTMENT OF ROADS - GOVERNMENT AFFAIRS DIVISION

Chapter 2 - Practice and Procedure for Contested Cases (Continued)

006.03 Continuances. The hearing officer may, in his or her discretion, grant extensions of time or *continuances of hearings upon the hearing officer's own motion or at the timely request of any party for good cause shown.* A party must file a written motion for continuance which states in detail the reasons why a continuance is necessary and serve a copy of the motion on all other parties.

006.03A Good cause. Good cause for an extension of time or continuance may include, but is not limited to, the following:

006.03A1 Illness of the party, legal counsel or witness;

006.03A2 A change in legal representation; or

006.03A3 Settlement negotiations are underway.

006.04 Amendments.

006.04A A petition may be amended at any time before an answer is filed or is due if notice is given to the respondent or his or her attorney. In all other cases, a petitioner must request permission to amend from the hearing officer.

006.04B A hearing officer may also allow, in his or her discretion, the filing of supplemental pleadings alleging facts material to the case occurring after the original pleadings were filed. A hearing officer may also permit amendment of pleadings where a mistake appears or where amendment does not materially change a claim or defense.

006.05 Informal Disposition. Unless otherwise precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

007 CONDUCTING A CONTESTED CASE HEARING

007.01 Order. At the discretion of the hearing officer, the hearing may be conducted in the following order:

007.01A The hearing is called to order by the hearing officer. Any preliminary motions, stipulations or agreed orders are entertained.

007.01B Each party may be permitted to make an opening statement. Opening statements take place in the same order as the presentation of evidence.

007.01C Presentation of evidence.

007.01C1 Evidence will be received in the following order:

007.01C1(a) Evidence is presented by the petitioner;

Title 407 - NEBRASKA DEPARTMENT OF ROADS - GOVERNMENT AFFAIRS DIVISION

Chapter 2 - Practice and Procedure for Contested Cases (Continued)

007.01C1(b) Evidence is presented by the respondent;

007.01C1(c) Rebuttal evidence is presented by the petitioner; and

007.01C1(d) Surrebuttal evidence is presented by the respondent.

007.01C2 With regard to each witness who testifies, the following examination may be conducted:

007.01C2(a) Direct examination conducted by the party who calls the witness;

007.01C2(b) Cross-examination by the opposing party;

007.01C2(c) Redirect examination by the party who called the witness; and

007.01C2(d) Recross-examination by the opposing party.

007.01D After the evidence is presented, each party may have opportunity to make a closing argument. Closing arguments shall be made in the same order as the presentation of evidence. *The hearing officer may request that the parties submit briefs in lieu of closing arguments.*

007.02 Evidence.

007.02A In contested cases the department or the hearing officer may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs and may exclude incompetent, irrelevant, immaterial and unduly repetitious evidence.

007.02B Any party to a formal hearing before the department, from which a decision may be appealed to the courts of this state, may request that the department be bound by the rules of evidence applicable in district court by delivering to the department at least three days prior to the holding of the hearing a written request therefore. Such request shall include the requesting party's agreement to be liable for the payment of costs incurred thereby and upon any appeal or review thereof, including the cost of court reporting services which the requesting party shall procure for the hearing.

007.02C Documentary evidence may be received in the form of copies or excerpts or incorporated by reference.

007.02D All evidence including records and documents in the possession of the department of which it desires to avail itself shall be offered and made a part of the record in the case. No factual information or evidence other than the record shall be considered in the determination of the case.

Title 407 - NEBRASKA DEPARTMENT OF ROADS - GOVERNMENT AFFAIRS DIVISION

Chapter 2 - Practice and Procedure for Contested Cases (Continued)

007.02E A hearing officer or designee may administer oaths and issue subpoenas in accordance with the rules of civil procedure except as may otherwise be prescribed by law. Subpoenas and orders issued under this subsection may be enforced by the district court.

007.02F The department shall give effect to the rules of privilege recognized by law.

007.02G The department may take official notice of cognizable facts and in addition may take official notice of general, technical, or scientific facts within its specialized knowledge and the rules and regulations adopted and promulgated by the department.

007.02G1 Parties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of materials so noticed.

007.02G2 Parties shall be afforded an opportunity to contest facts so noticed.

007.02G3 The record shall contain a written record of everything officially noticed.

007.02H The department may utilize its experience, technical competence and specialized knowledge in the evaluation of the evidence presented to it.

007.03 Conducting the hearing by electronic means. The hearing officer may conduct all or part of the hearing by telephone, television, or other electronic means if each participant in the hearing has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.

007.04 Official record.

007.04A The department shall prepare an official record, which shall include testimony and exhibits, in each contested case, but it shall not be necessary to transcribe the record of the proceedings unless requested for purpose of rehearing or appeal, in which event the transcript and record shall be furnished by the department upon request and tender of the cost of preparation.

007.04B The department shall maintain an official record of each contested case under the Administrative Procedure Act for at least four years following the date of the final order.

007.04C The department record shall consist only of the following:

007.04C1 Notices of all proceedings;

007.04C2 Any pleadings, motions, requests, preliminary or intermediate rulings and orders, and similar correspondence to or from the department pertaining to the contested case;

DEC -9 2004

Title 407 - NEBRASKA DEPARTMENT OF ROADS - GOVERNMENT AFFAIRS DIVISION

Chapter 2 - Practice and Procedure for Contested Cases (Continued)

007.04C3 The record of the hearing before the department, including all exhibits and evidence introduced during such hearing, a statement of matters officially noticed by the department during the proceeding, and all proffers of proof and objections and rulings thereon; and

007.04C4 The final order.

007.04D As provided in Section 002.03 of Chapter 2 of these rules and regulations, the hearing officer or the director, or an employee who is or may reasonably be expected to be involved in the decision-making process of the contested case who receives or who makes or knowingly causes to be made an ex parte communication as set forth in that subsection shall make the appropriate filings which shall be included in the official record of the contested case.

007.04E Except to the extent that the Administrative Procedure Act or another statute provides otherwise, the department record shall constitute the exclusive basis for department action in contested cases under the act and for judicial review thereof.

007.05 Costs. All costs of a formal hearing shall be paid by the party or parties against whom a final decision is rendered.

008 DECISION AND ORDER IN A CONTESTED CASE

008.01 Every decision and order adverse to a party to the proceeding, rendered by the department in a contested case, shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law.

008.02 The decision and order should include:

008.02A "Nebraska Department of Roads," the name of the division, district or section, and the name of the proceeding;

008.02B The time and place of the hearing;

008.02C The names of all parties or their attorneys who entered an appearance at the hearing;

008.02D The findings of fact consisting of a concise statement of the conclusions upon each contested issue of fact;

008.02E The conclusions of law consisting of the applications of the controlling law to the facts found and the legal results arising therefrom; and

ASSISTANT ATTORNEY GENERAL
Y8
2004 DEC 9 10:32

Title 407 - NEBRASKA DEPARTMENT OF ROADS - GOVERNMENT AFFAIRS DIVISION

Chapter 2 - Practice and Procedure for Contested Cases (Continued)

008.02F The order consisting of the action taken by the department as a result of the facts found and the legal conclusions arising therefrom.

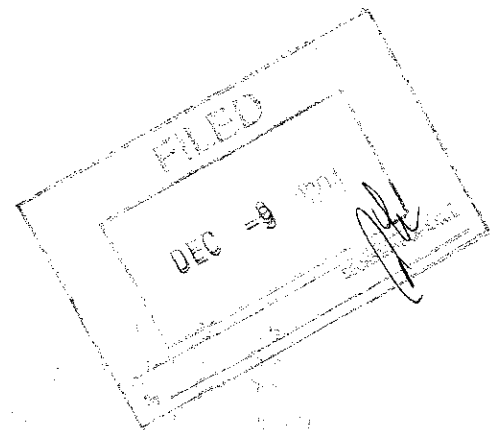
008.03 Parties to the proceeding shall be notified of the decision and order in person or by mail. A copy of the decision and order and accompanying findings and conclusions shall be delivered or mailed upon request to each party or his or her attorney of record.

009 APPEALS

009.01 Any person aggrieved by a final decision in a contested case is entitled to judicial review under the Administrative Procedure Act or to resort to such other means of review as may be provided by law.

009.02 Parties desiring to appeal a department decision must file a petition for review in the district court of the county where the department action is taken within thirty days after the service of the final decision by the department. The thirty day period for appeal commences to run from the date of mailing of the notice of order and decision to the parties or their attorneys of record. Service of the petition and summons must be made in accordance with Nebraska law.

009.03 Unless otherwise provided by statute, the procedures of Neb. Rev. Stat. § 84-917 govern the procedure for taking an appeal.



APPROVED
JON BRUNING
ATTORNEY GENERAL

SEP 28 2004

BY Jeffery T. Schweder
ASSISTANT ATTORNEY GENERAL

APPROVED

DEC 9 2004


MIKE JOHANN'S
GOVERNOR